No. 87-5677

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

WARREN LEE HARRIS,

Petitioner,

v.

MARVIN REED, Warden, and NEIL F. HARTIGAN, Attorney General of the State of Illinois,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA EX REL. JOHN K. VAN DE KAMP, ATTORNEY GENERAL AND THE STATES OF MISSISSIPPI AND NORTH CAROLINA

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QUESTION PRESENTED

Does a state forfeit the benefit of the waiver doctrine where its reviewing court, after plainly stating the defendant is procedurally barred from obtaining relief, discusses the weakness of the merits of the case?

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Amici files this brief pursuant to Rule 36.4 of the Supreme Court of the United States.

INTEREST OF AMICI

This brief is in support of that portion of the opinion below in Harris v.

Reed, 822 F.2d 684, 686-687 (7th Cir. 1987), which held that, where the state reviewing court relies both on a procedural bar and the weakness of the issues, the state defendant is barred from obtaining relief in the federal courts unless he meets the "cause and prejudice" standard.

California reviewing courts, as discussed in the argument portion of this brief, often rely on both the procedural bar and the weakness of the merits of the case when denying relief on appeal. The clear reason the state courts follow the foregoing practice is to inform the lower courts and the bar of the applicable law pertaining to the merits of the case. Further, the state court's practice shows the defendant that relief was not denied solely for technical reasons. Nevertheless, as shown herein, the Ninth Circuit

Court of Appeals holds that there is no procedural bar wherever a state reviewing court alternatively decides an issue on the merits. Thus, amici have a strong interest in ensuring that the state is not penalized by being denied the benefit of the waiver doctrine merely because the state reviewing courts, after finding there is a procedural bar, in the alternative, discuss the weakness of the merits of the case.

SUMMARY OF ARGUMENT

Amici urge that wherever a state reviewing court relies upon a procedural bar as an independent basis for denying relief (assuming the "cause and prejudice" standard has not been satisfied), the state defendant is procedurally barred from obtaining relief in the federal courts even if the state court rules alternatively on the merits of the

contentions.

State reviewing courts should not be penalized for performing the admirable task of advising the bar and the parties to the state appeal as to the law pertaining to the merits of the appeal. As long as the state plainly relies on a procedural bar, regardless of whether it also alternatively determines the weakness of the merits, the state defendant should be procedurally barred from obtaining relief in federal habeas corpus proceedings. (Caldwell v. Mississippi, 472 U.S. 320, 327 (1985), stating that the state defendant is procedurally barred [assuming the "cause and prejudice" standard has not been met] in federal habeas corpus proceedings where the state reviewing court relied on independent state procedural grounds.)

ARGUMENT

WHERE THE STATE REVIEWING COURT DECIDES AN ISSUE ON PROCEDURAL GROUNDS AND ON THE MERITS, THE DEFENDANT SHOULD BE PROCEDURALLY BARRED FROM OBTAINING RELIEF IN THE FEDERAL COURTS

Amici urge that a state defendant should be denied relief in federal habeas corpus proceedings under the waiver doctrine wherever the following circumstances exist: (a) the state reviewing court, although reaching the merits of the issues also states explicitly that the state defendant is procedurally barred from obtaining relief, and (b) the defendant has failed to show "cause and prejudice."

This Court has held that where a state reviewing court relies upon a procedural bar as an independent basis for denying relief (assuming the "cause and prejudice" standard has not been

satisfied), the state defendant is barred from obtaining relief in federal habeas corpus proceedings. (Caldwell v. Mississippi, 472 U.S. 320, 327 (1985); see also, Michigan v. Long, 463 U.S. 1032, 1041 (1983), upon which Caldwell relied.) Hence whenever a state reviewing court decides an issue alternatively on procedural grounds and then on the merits, the state court has set out an independent procedural basis for denying the defendant relief. Thus, under both Caldwell and Long, the state defendant (absent a showing of "cause and prejudice" should be procedurally barred from obtaining relief from this Court. This procedure is in accordance with this Court's policy of giving recognition to comity and finality of judgment. (Reed v. Ross, 468 U.S. 1, 10-11 (1984.)

In United States ex rel. Caruso v.

Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982), the Circuit Court observed that a state court, after ruling that the defendant is procedurally barred from obtaining relief on appeal, may also issue an opinion on the merits to show that its reliance on a procedural rule has not caused great injustice to the defendant. The court also stated that a state court may want to clarify an important issue. Thus, the court concluded that where a state reviewing court rules on the merits in addition to holding that the defendant is procedurally barred, he is entitled to no relief in federal habeas corpus proceeding unless he meets the "cause and prejudice" standard. This clearly is in accord with this Court's statement in Wainwright v. Sykes, 433 U.S. 72, 90 (1977), that the waiver doctrine ensures finality of

judgment as opposed to a "'tryout on the road'" to a federal habeas corpus hearing.

It is strongly urged that a state court, which relies on a procedural bar, should not be penalized where it also clarifies issues or insures the parties that even if there were no procedural bar, the defendant still would not prevail. California reviewing courts have strong interests in rendering decisions on the merits after invoking the procedural bar. For instance, a state reviewing court, after finding a procedural bar in the alternative, could rule that there is no merit to the defendant's contention so as to inform him that even in the absence of the procedural defect, he would not have prevailed. Further, counsel for the defense and counsel for the People have

an urgent need to know whether they have erred. This is due to the fact that in California, if it is held that a judgment is reversed because of ineffective representation, the reviewing court will report the matter to the State Bar for possible disciplinary action against defense counsel. Moreover, the same procedure is required if there is a reversal due to prosecution misconduct, that is, the prosecutor's name will be given to the State Bar for possible disciplinary action. (Cal. Bus. & Prof. Code, § 6086.7.)

In addition to the above reasons for alternatively deciding a case on the merits, trial judges need to be informed of the applicable law so that they will not make mistakes in the future.

California has ruled alternatively on procedural grounds and on the merits

in capital cases, especially regarding allegations of prosecution misconduct. (See People v. Hendricks, 44 Cal.3d 635, 649-650 [244 Cal.Rptr. 181, 189] (1988), and People v. Ruiz, 44 Cal.3d 589, 622 [244 Cal.Rptr. 217] (1988), and allegations of court misconduct, see People v. Melton, 44 Cal.3d 713, 753 [244 Cal.Rptr. 867, 899] (1988).) Also, in non-capital cases, the state reviewing courts have made alternative rulings. For instance, in People v. Solis, 172 Cal.App.3d 877, 885 [218 Cal.Rptr. 469] (1985), the Court of Appeal ruled alternatively on the issue of the admissibility of evidence and in People v. Redmond, 29 Cal.3d 904, 909 [176 Cal.Rptr. 780, 783] (1982), the California Supreme Court ruled alternatively on the propriety of the prosecutor's argument.

The Ninth Circuit's practice of

finding no procedural bar where the state reviewing court renders a decision on the merits after holding that there was a procedural bar (Bradford v. Stone, 594 F.2d 1294, 1296, fn. 2 (9th Cir. 1979)), penalizes California for performing the foregoing functions of advising the bar, the lower courts and the parties to the suit as to the applicable law. It is urged that this is contrary to one of this Court's key reasons for enforcing the waiver doctrine, namely, that "Issuance of a habeas writ, finally, exacts an extra charge by undercutting the State's ability to enforce its procedural rules." (Engle v. Isaac, 456 U.S. 107, 129 (1982).)

Thus, where a state reviewing court finds a procedural bar because of the defendant's failure to follow mandated procedures in the trial court, he should

be barred from obtaining relief in the federal courts even if the state court found alternatively that there was no merit to his contention.

CONCLUSION

For the foregoing reasons, amici respectfully submits that where a state court renders a decision on the alternative grounds of waiver and on the merits, the state defendant, providing he cannot show "cause and prejudice," should be barred from obtaining relief in the federal courts.

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
STEVE WHITE, Chief Assistant
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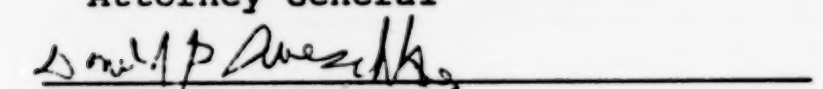

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PROOF OF MAILING--AFFIDAVIT

I, DONALD F. ROESCHKE, one of the attorneys for the People of the State of California, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of June, 1988, I deposited in a United States Post Office box located at the State Attorney General's Office, 3580 Wilshire Boulevard in Los Angeles,

California, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Amici Curiae Brief.

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SUBSCRIBED AND SWORN to before me at Los Angeles, California, this 9th day of June, 1988.

NOTARY PUBLIC in and for the State of California, County of Los Angeles.

LORRAINE J. EDGAR
NOTARY PUBLIC - CALIFORNIA
COUNTY OF LOS ANGELES
My Commission Expires April 18, 1992